Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada),

applicant,

and

Pacific Coach Lines Ltd.,

employer,

and

Cantrail Coach Lines Ltd.,

employer.

Board Files: 27984-C and 28548-C
Neutral Citation: 2012 CIRB **623**
January 24, 2012

Counsel of Record

Mr. Peter Shklanka, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada);

Messrs. Joseph M.G. Shaw and Kacey A. Krenn, for Pacific Coach Lines Ltd. and Cantrail Coach Lines Ltd.

A panel of the Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members, has considered the above-cited application for a bargaining unit review, declaration of single employer

and declaration of sale of business, filed by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (CAW or the union) on February 25, 2010 (Board file no. 27984-C), and the unfair labour practice complaint filed by the union on January 25, 2011 (Board file no. 28548-C).

The Board consolidated the application and the complaint for the purposes of hearing and determination. Hearings were held in Vancouver, British Columbia, on March 7–9, June 27–30 and July 5–8, 2011. On consent, the parties submitted their final arguments to the Board in writing. Pleadings closed with the filing of the union's written reply arguments on September 16, 2011.

During the course of the Board's proceedings, two confidentiality orders were issued with respect to some of the documents that were entered as exhibits. As a result, the details of certain financial transactions that were in evidence before the Board are not included in these reasons.

I–Background

[1] In the context of the union's application for a declaration of single employer, the Board issued an interim decision on September 24, 2010, *Pacific Coach Lines Ltd.*, 2010 CIRB LD 2427 (*PCL 2427*), in which it determined that both of the employers that are the subject of the union's application, Pacific Coach Lines Ltd. (PCL) and Cantrail Coach Lines Ltd. (Cantrail), were subject to federal jurisdiction for labour relations purposes. The Board subsequently issued a certification order (9954-U) confirming that the CAW continued to represent the unit of PCL employees it had formerly represented pursuant to certification orders issued by the provincial labour board.

[2] After the release of *PCL 2427*, PCL informed the Board that, as of January 21, 2011, it no longer engages in any extra-provincial work. This was a relevant and important fact, given that the Board's determination in *PCL 2427* that PCL was in federal jurisdiction rested on its finding that the company was involved in regular and continuous extra-provincial activities. On January 25, 2011, the union filed an unfair labour practice complaint against the employers, alleging violation of sections 50, 94(1)(*a*), 94(3)(*b*), 97 and 99 of the *Canada Labour Code (Part I–Industrial Relations)*

(the *Code*). The union submits that the decision by PCL/Cantrail to discontinue PCL's extra-provincial charter business is an attempt to subvert the protections afforded to unions under the *Code* and is destructive to the union's bargaining rights.

II–Facts

[3] The Board has thoroughly reviewed and considered the extensive documentation and oral evidence provided by the parties, including the exhibits filed during the hearing and the written submissions of counsel. For the purpose of this decision, the Board will only refer to the evidence that it considers relevant to the determination of these matters.

A–PCL

[4] PCL was incorporated in its present form under the laws of British Columbia in March 1989. It is now a privately owned company, although it can trace its origins back to Pacific Stage Lines, a division of BC Transit, which was owned by the government of British Columbia. Pacific Stage Lines merged with Vancouver Island Coach Line Limited in or about 1979 and the merged company was privatized in 1984.

[5] PCL operates some 45 coaches and has 156 employees. There are 134 employees in the bargaining unit represented by the CAW, including 78 drivers. The bargaining unit also includes customer service agents and maintenance department employees. In addition to servicing its own equipment, PCL provides maintenance, servicing (cleaning) and bus yarding services to a number of other bus companies including Cantrail, Horizon Coach Lines, Pacific Western Transportation, Greyline Victoria and Brewster Transportation.

[6] PCL's primary business is providing scheduled bus service within British Columbia. It provides regularly scheduled bus service between Vancouver and Victoria; the Vancouver International

Airport (YVR) and Victoria; YVR and Whistler; and Vancouver and Whistler. Since obtaining the contract to provide service to Whistler in 2007, PCL has purchased eight new coaches and hired 24 new drivers. The Whistler contract has enabled PCL to retain drivers who would otherwise have been laid off for the winter and to use its fleet on a year-round basis.

[7] The evidence before the Board at the time it issued *PCL 2427* was that, although PCL is primarily engaged in providing scheduled daily bus service within British Columbia, it also offered a full range of sightseeing and charter services. Over the four year period between 2007–2010, PCL performed an average of 1,700–2,000 charter trips per year. Approximately half of PCL's vehicles were licensed and insured for extra-provincial travel. PCL was licensed to pick up passengers in Seattle and at the Seattle-Tacoma International Airport. It was a signatory to the International Fuel Tax Agreement (IFTA), which allows for travel across provincial and international boundaries and has other tax related benefits for members. While the number of extra-provincial trips was relatively low (approximately 2–3% of all charters) and varied from month to month, the evidence indicated that its extra-provincial operations were regular and continuous.

[8] Effective January 21, 2011, PCL ceased offering any extra-provincial services. It modified its motor vehicle insurance coverage to a maximum radius of 160 km, thereby eliminating its ability to travel outside of British Columbia. It cancelled its IFTA license and its permit to access the Seattle-Tacoma airport. PCL closed its account with DriveCheck Inc. (a firm that assisted it in ensuring compliance with US Department of Transport regulations, including mandated drug and alcohol testing of drivers). As a result of this, PCL drivers are not permitted to drive buses in the United States. It submitted a cancellation notice to the Oregon Department of Transportation. PCL also removed all references to extra-provincial services from its website. On January 21, 2011, PCL sent the CAW a notice informing it of these changes, and distributed a notice to this effect to the employees.

[9] The last extra-provincial trip PCL performed was on or about January 12, 2011; for bookings after that date, it informed customers that they would have to secure alternative services. There was no evidence presented that PCL directed these customers to Cantrail, and PCL denies having done so.

B–Cantrail

[10] Prior to its purchase by PCL, Cantrail was a family owned business, incorporated in British Columbia in 1980. It encountered financial difficulties in 2004 and went into receivership in April 2005. The principals of PCL initially considered purchasing only certain of Cantrail's assets, but realized that Cantrail's licence to provide scheduled service between Vancouver and Seattle had commercial value. After determining that Cantrail could be restructured to be financially viable, PCL purchased all of the outstanding shares of Cantrail through a Share Purchase Agreement dated August 12, 2005 (subsequently modified on April 1, 2006). The former owners, a Mr. and Mrs. McCorkell, remained involved in the management of Cantrail following its purchase by PCL and, at their insistence, Cantrail was operated as a separate entity and was not merged into PCL's operations.

[11] Although Cantrail is wholly owned by PCL and the McCorkells are no longer involved in its operation, at the time of the Board's proceedings Cantrail continued to operate as a separate entity, with its own buses, employees and corporate branding. Cantrail's fleet consists of some 15 motor coaches and 1 mini bus. Following PCL's purchase of Cantrail, some of its older coaches were sold and several new ones were acquired, but the fleet remained the same size. Cantrail has 31 employees, including 25 full and part-time drivers. Cantrail's employees are not unionized. The company has its own Operations Manager, Charter Manager and dispatcher. Cantrail contracts with PCL for maintenance and servicing work, but is also able to use the services of other maintenance service providers.

[12] Cantrail provides both scheduled and charter bus services. It has an exclusive contract with Amtrak to provide daily scheduled service between Vancouver and the Seattle Amtrak Station, and it provides daily scheduled service between Vancouver and Mission B.C., through a contract with West Coast Express that it won in September 2007. Four coaches are dedicated to the Amtrak service and three are dedicated to the West Coast Express service. One coach is leased to Whistler Connections. The remainder are available for charter work, which is mainly seasonal.

C–The Relationship between PCL and Cantrail

[13] While maintaining that PCL and Cantrail operate as separate and distinct entities, the employers concede that they are subject to common control or direction within the meaning of section 35 of the *Code*. Cantrail is wholly owned by PCL. The corporate officers of both companies include Frank Chen, Sean Chen, Harry Chow, Seon Lee, Michael Su, Dennis Shikaze and Martin Yeh. Mr. Thomas Choe, the Vice-President, Operations and Planning at PCL, works for both PCL and Cantrail. Mr. Choe estimates that he spends approximately 20% of his time managing Cantrail.

[14] Cantrail's office is separate from that of PCL, but it leases this office space in a building on Vernon Drive in Vancouver from PCL. At various times in the past, other companies unrelated to PCL (e.g., Horizon Coach Lines) have leased office space at this location. The two companies maintain separate signs, letterheads, logos, websites and employee uniforms.

[15] Each company maintains its own fleet of vehicles and list of qualified drivers. PCL provides Cantrail with bus maintenance and cleaning services, and also provides these services to other bus companies. The rates for these services are negotiated with each company based on volume.

[16] PCL has its own customer service agents, who work in various locations. Cantrail does not have ticket agents; tickets for its scheduled services are issued by Amtrak or West Coast Express. Cantrail's charter sales are handled by its Charter Manager, who does not work for PCL. Until recently, PCL ticket agents sold tickets for Cantrail charters to Seattle as part of travel packages sold by PCL, but this practice has ceased. Each company has its own dispatchers. There is no intermingling of operational or bargaining unit employees between PCL and Cantrail. However, until recently, the same individual was contracted to perform marketing and sales services for both companies.

[17] The employers suggest that PCL and Cantrail appeal to different segments of the market, and that charter customers decide, on their own, which company to book with, based on factors such as reputation, price, type of equipment and branding. The employers admit that PCL's prices tend to be higher than Cantrail's, but PCL denies that it directs charter clients to Cantrail if it cannot meet

a customer's price requirements. PCL endeavours to brand its scheduled services as a premium service, since fares on its cross-water routes are significantly higher than those of BC Transit and Translink. To do this, it has deployed the newer coaches to the cross-water service.

[18] The evidence before the Board indicated that when PCL has excess work, it will farm out its overloads to Cantrail and other bus companies. Similarly, Cantrail may farm out its overload work to PCL or to other companies. Both Cantrail and PCL may perform overload work on behalf of other bus companies.

[19] The Board was informed that there is a third related company, Whistler Connections, which provides shuttle services in and around Whistler on behalf of PCL and also operates its own Vancouver to Whistler charter service. Whistler Connections is not a party to these proceedings, although it leases one bus from Cantrail.

III–Positions of the Parties

A–The CAW

1–Board File No. 27984-C

[20] The union submits that the Board should dismiss the employers' request that it redetermine the question of jurisdiction based on the events of January 2011. The union argues that it is improper for the employers to now argue that PCL is not in federal jurisdiction, as the Board ruled on jurisdiction in *PCL 2427* and is now *functus* on that point. It points out that PCL did not file an application for reconsideration of *PCL 2427* on the basis of new facts, nor did it seek judicial review of that decision. The union argues that the Board should determine its application on the basis of the facts as they existed as of the date of the application, namely February 25, 2010. It argues that to do otherwise would defeat the labour relations purpose of section 35 of the *Code*, by allowing the employer to escape their application and effect through arrangements made or conditions arising post-application, whether done so deliberately for that purpose or not.

[21] In the alternative, the union suggests that the Board could find that PCL remains in federal jurisdiction despite its restructuring, because PCL and Cantrail are a single enterprise. Essentially, the union argues that it is not necessary for the Board to find that both employers are in federal jurisdiction before proceeding to its analysis of whether the two are a single employer within the meaning of section 35 of the *Code*. It suggests that by dealing with the question of jurisdiction separately from its consideration of common control or direction, the Board risks giving primacy to form over substance. It suggests that the Board followed this approach in *J.R. Richard (1991) ltée*, 2001 CIRB 128, when it stated:

> [41] With respect to complaints of not having ruled on the federal or provincial nature of the companies prior to considering the relatedness of the operations, the Board is of the view that to isolate these criteria would be to allow the circumvention that section 35 is designed to prevent. ...

[22] The union submits that the Board should find that PCL and Cantrail are a single enterprise because they are under common management and control. It argues that they operate out of the same facilities; decisions affecting labour relations are made by the same individuals; the companies are financially interdependent and integrated; the operations are physically integrated; and Cantrail relies on PCL for the maintenance and servicing of its vehicles. The union alleges that PCL's owners, officers and directors run Cantrail's operations and that the two companies are integrated on a management and operational level. It submits that because Cantrail is a wholly owned subsidiary of PCL, the latter exercises complete control of the former. PCL can decide to shut Cantrail down, or try to build it into something of comparable size to PCL. The union argues that because of Cantrail's extra-provincial operations, the single enterprise composed of PCL and Cantrail are in federal jurisdiction.

[23] The union also argues that PCL can be found to be in federal jurisdiction because its operations are vital or essential to the core of Cantrail's operations, not only in terms of Cantrail's reliance on PCL's service and maintenance facilities, but also in terms of physical integration, financial dependence and integration and labour relations management.

[24] The union argues that all of the criteria for a declaration of single employer have been met in this case. It submits that the purpose of section 35 of the *Code* is remedial and intended to ensure that

the institutional rights of a trade union, and the contractual rights of its members, attach to a definable commercial activity rather than the legal vehicle(s) through which the activity is carried on; legal form should not be permitted to dictate or fragment a collective bargaining structure or undermine established bargaining rights (citing *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, at paragraph 12). It points out that, in exercising its discretion under section 35 of the *Code*, it is not necessary for the Board to find that there was any anti-union animus underlying the corporate structure–the Board can find that two enterprises are a single employer even when the corporate arrangements were implemented for *bona fide* business reasons and not simply for the purpose of undermining or avoiding bargaining rights.

[25] The union argues that the Board should exercise its discretion to issue a single employer declaration in order to prevent the employer from avoiding responsibilities and undermining the employees' rights under the *Code*. While recognizing that the creation or acquisition of subsidiary companies is not prohibited by the *Code*, the union argues that, when such a corporate structure serves to defeat the freedoms or rights of employees and trade unions, section 35 of the *Code* is the appropriate remedial avenue. It argues that, unlike other labour relations boards, this Board does not typically require proof of actual or threatened erosion of bargaining rights or loss of work opportunities in order to exercise its discretion to issue a single employer declaration (citing *Transport Route Canada Inc. et al.* (1987), 70 di 153; and 17 CLRBR (NS) 340 (CLRB no. 638). The union argues that the very existence of a related, non-union entity performing work in the same market distorts and undermines the collective bargaining process. Furthermore, the union argues, the fact that Cantrail engaged in similar activities before it was purchased by PCL should not militate against a single employer declaration.

[26] The union also argues that a union's failure to organize employees at a related non-union company is not a relevant consideration with respect to the exercise of the Board's discretion under section 35 (citing *KNK Limited*, [1991] OLRB Rep. February 209, at paragraphs 38–41). It submits that the existence of a related entity under the same corporate umbrella, carrying on the same business as the unionized entity, is sufficient to meet the criteria for exercise of the Board's discretion, as the nature of this relationship is inherently disruptive to the union's bargaining rights.

[27] The union argues that the Board should exercise its discretion to issue a single employer declaration in this case because PCL owns and controls Cantrail; PCL and Cantrail carry on the same business; and PCL has a unionized workforce performing the work while Cantrail does not. It submits that this is a classic case of "double-breasting", where two related companies carry on business in the same market or industry. The union argues that the fact that PCL contracts or "farms out" work to Cantrail is evidence of the labour relations harm that is created by permitting Cantrail to continue to operate as a non-union enterprise (citing *Cronkwright Transport Limited*, [1990] OLRB Rep. July 768, at paragraph 36). The union argues that PCL's ability to farm out its overload work to Cantrail undermines the bargaining unit by creating a disincentive for PCL to develop its fleet to meet the true requirements of its business or any new business it acquires. Essentially, Cantrail allows PCL to have a buffer against making decisions to increase its fleet size.

[28] The union suggests that Cantrail poses a real, not hypothetical, threat to PCL employees, as all parties agree that Cantrail and PCL are competitors for charter work. The union alleges that PCL has made a conscious decision to focus its expertise and resources on developing Cantrail's charter business, outside of the collective agreement, to the detriment of PCL and its unionized employees. Over time, this has the potential to result in a transfer of work opportunities from unionized workers at PCL to non-unionized workers at Cantrail. From a practical perspective, clients are more likely to book charters with the company that can offer a lower cost service, namely Cantrail. The union submits that the loss of charter work results in the loss of working hours available to PCL drivers and may also result in the loss of benefits if the driver is unable to obtain full time hours.

[29] Furthermore, the union alleges, there is nothing to prevent Cantrail from competing with PCL for scheduled service contracts in the future. The management of PCL decides which company will bid on the work that becomes available. Because the principals of both companies are the same, they will benefit regardless of which company wins the contract. The union provides the example of the West Coast Express service: when this contract was tendered, the principals of PCL made the decision that Cantrail would bid on it, even though PCL could have performed the work. The union submits that PCL is making decisions as to whether it wants to pursue new opportunities through

its unionized or non-union operations, and is directing significant work opportunities to its non-union operation. This, the union submits, is strong evidence of the labour relations harm that could be avoided by a single employer declaration.

[30] Alternatively, the union argues that there has been a partial sale of the extra-provincial business from PCL to Cantrail, such that the union should benefit from the successor rights provisions contained in sections 44–46 of the *Code*. In the union's submission, the chain of events resulting in a sale of business under the *Code* commenced with PCL's purchase of Cantrail and subsequent establishment of common control and management over the two companies. The union argues that the disposition of PCL's extra-provincial charter business crystallized at the point PCL ceased doing this work while Cantrail continued to carry on the extra-provincial charters.

[31] In support of its sale of business argument, the union suggests that Cantrail is carrying on work for PCL's former clients, using managers supplied by PCL; that PCL provided financial support and assistance to restructure or settle Cantrail's debts and make it financially viable; and that PCL continues to provide know-how, expertise and logistical support to Cantrail.

2–Board File No. 28548-C

[32] The union filed an unfair labour practice complaint in January 2011, alleging that PCL's closure of its extra-provincial charter operations constitutes unlawful interference with the union, in violation of section 94(1)(*a*) of the *Code*. It suggests that this corporate reorganization was undertaken to prevent or impede the union from exercising its rights under the *Code*; to deprive the bargaining unit members of work and to set up a "double breasting" arrangement that will allow the employer to avoid its obligations under the PCL collective agreement. It submits that PCL's actions were not taken for legitimate business reasons, but were the result of anti-union animus and constitute a repudiation of commitments and agreements made during collective bargaining.

[33] During the round of collective bargaining that took place in 2009 and resulted in the current collective agreement between the parties, the union raised concerns regarding the work that was being done by Cantrail and the decline of charter work at PCL. It sought to have Cantrail bound by

its collective agreement with PCL or to include language that would prevent PCL from sending work to Cantrail. Although PCL would not agree to either of these proposals, it did agree to recognize that it was federally regulated and not to oppose the union's application to the Board for successor rights due to a change in jurisdiction. The union submits that PCL should not be permitted to resile from this agreement.

[34] The union alleges that the employer did not raise concerns regarding the viability of PCL's charter work, nor did it seek to obtain concessions with respect to charter work, particularly cross-border charter work, during collective bargaining. The employer also failed to provide the union with any advance notice of its decision to discontinue PCL's extra-provincial operations or seek to discuss its concerns regarding this work with the union. The union suggests that these facts are evidence that PCL's decision was motivated by anti-union animus rather than *bona fide* business considerations.

[35] It suggests that the testimony given by the employer's witnesses regarding the timing of the decision and the reasons for it is not credible and should not be accepted by the Board. At the time that PCL made the decision to cease operating extra-provincial charters in late 2010, it had some nine charters booked for 2011; all but one were cancelled by PCL. The union argues that the review the employer allegedly conducted regarding the profitability of the extra-provincial work was not undertaken in a meaningful manner and that the employer has failed to provide adequate evidence in this proceeding to justify the conclusion that such business was not profitable. It points out that there are no contemporaneous documents on the record supporting the decision and argues that the spreadsheet submitted by the employer is unreliable and based on flawed reasoning (for example, attributing operating costs per mile for scheduled service and charter work as if they were the same, when they are not). Furthermore, the union alleges, the spreadsheet was prepared only after the decision to discontinue the extra-provincial service had already been made, in order to cover PCL's tracks. The union suggests that the inadequacy of documentation supporting the decision that PCL took is evidence that the decision was taken for improper motives and not for *bona fide* business reasons. The union states that further evidence for its contention can be found in the fact that all of PCL's competitors, other than Wellstone Coach, a small charter company that operates mid-size buses, provide extra-provincial charter services. The union submits that the proposition that

extra-provincial work is necessary for the survival of a business that solely performs charter work is equally applicable to operations, like PCL and Cantrail, that provide both fixed schedule and charter services.

[36] The union also asserts that the employer failed to provide the union with any notice that PCL was reviewing its extra-provincial charter operations or any advance notice that a decision had been taken to close those operations. The union submits that, in view of the circumstances, PCL had a duty to consult with the union in good faith before making decisions regarding its extra-provincial charter work. The union argues that the employer has unlawfully interfered with the trade union by establishing a structure that will allow it to carry on business through a non-union subsidiary at lower, non-union rates. PCL failed to inform the union, or discuss with the union, its plan to cease providing extra-provincial service despite the impact of this decision on the type and amount of work available to members of the PCL bargaining unit.

[37] The union submits that the employer has no credible explanation as to how and why it made the decision to shut down PCL's extra-provincial charter operations, and that the Board can infer from this that PCL's attempts to prevent the Board from exercising jurisdiction over it, and thereby preventing a declaration of common employer with Cantrail, was motivated by anti-union animus. Despite the fact that PCL had agreed with the union during collective bargaining that it was federally regulated, it then took steps that would allow it to assert that it was no longer in federal jurisdiction. The union alleges that, through its actions, PCL has demonstrated its intent not only to engage in a "double breasting" scheme, but an inter-jurisdictional double breasting scheme that would, as such, permanently insulate PCL and Cantrail from the reach of common employer provisions in either jurisdiction. It argues that given the significant, deleterious impact of the employer's actions on the bargaining unit, PCL was under an obligation to consult with the union before proceeding with the reorganization.

B–PCL/Cantrail

1–Board File No. 27984-C

[38] The employers submit that, as a result of the cessation of its extra-provincial operations, PCL is no longer a federal undertaking, and thus the Board has no jurisdiction to make the declaration of single employer sought by the union. As jurisdiction is a threshold issue, the Board must be satisfied that it has constitutional jurisdiction over the parties prior to exercising its powers under the *Code* (citing *Allcap Baggage Services Inc.*, (1990) 79 di 181; and 7 CLRBR (2d) 274 (CLRB no. 778); and *Canadian National Railway Co.* v. *Canadian Transport Commission*, [1988] 2 F.C. 437).

[39] PCL also submits that its operations are not integral, vital or essential to Cantrail's operations, despite the fact that it provides maintenance services for Cantrail. While admitting that the Board's jurisprudence is to the effect that service and maintenance of a core federal undertaking engaged in trucking is an integral part of that undertaking and falls under federal jurisdiction (see, for example *Bernshine Mobile Maintenance Ltd.* (1984), 56 di 83; 7 CLRBR (NS) 21; and 84 CLLC 16,036 (CLRB no. 465); and *Highway Truck Service Ltd.* (1984), 57 di 178 (CLRB no. 486), upheld by the Federal Court of Appeal in *Highway Truck Service Ltd. v. Canada (Labour Relations Board)*, (1985) 62 N.R. 218 (F.C.A.), PCL submits that Cantrail would not be severely disadvantaged if PCL ceased to perform its maintenance (citing *Bruce Stewner*, (1993) 93 di 59; and 21 CLRBR (2d) 271 (CLRB no. 1040).

[40] Alternatively, the employers argue that if the Board concludes that PCL falls under federal jurisdiction, there is no labour relations purpose for the Board to make a declaration that PCL and Cantrail are a single employer. The employers deny that this is a situation of "double breasting", and submit that the union is improperly attempting to use the single employer provisions to expand the scope of its certification order. The employers argue that the Board would have to find convincing evidence that the union's bargaining rights have been or are likely to be undermined in order to conclude that a labour relations purpose exists, and deny that there is any such impact on the CAW in this case. It points out that, in the years since PCL purchased Cantrail, PCL's employees have benefitted from a steady increase in the total number of hours worked, from 162,385 in 2005 to

259,595 in 2009 and 224,267 in 2010. In addition, PCL has purchased 8 new coaches and hired 24 new drivers since 2007. The employers submit that the acquisition of the exclusive Whistler contract has permitted PCL to retain drivers during the winter months, therefore reducing or eliminating the need for seasonal lay-offs. Furthermore, by servicing buses for other companies, PCL creates additional work for bargaining unit members. The employers submit that these facts demonstrate that the existence of Cantrail has had no negative effect on the PCL bargaining unit or the union's bargaining rights in respect of that unit.

[41] The employers suggest that Cantrail has remained approximately the same size, and with the same volume of work, as it had prior to the financial difficulties that resulted in its sale to PCL. The employers state that each company determines, on its own, how to allocate buses to different types of service. In response to the union's allegation that the owners can direct work to either company and did so to PCL's detriment with respect to the West Coast Express contract, the employers indicate that they were of the view that the West Coast Express work was more similar to Cantrail's existing Amtrak contract and therefore fit more appropriately within Cantrail's business model.

[42] Other than the overload situations, the employers deny that PCL diverts work to Cantrail. They argue that the farming out of overload work to other bus companies is a common practice in the industry and that PCL uses many different bus companies for overload work, not just Cantrail. The practice at both companies is to call around to see what company has availability to do the work; when a company accepts the overload work, it performs that work as a charter. PCL will assign overload work to Cantrail on the YVR-Whistler route when there are insufficient PCL drivers or vehicles to perform the work and contends that it has a right to do so in accordance with the collective agreement between PCL and the CAW. However, because Cantrail has fewer buses available for charter work, it does not have as much capacity to pick up overload work.

[43] The employers argue that, in view of these facts, there is no evidence that the union's bargaining rights in respect of the PCL employees have been or are likely to be undermined by the existence of Cantrail, and thus there is no labour relations mischief that must be remedied by a declaration pursuant to section 35 of the *Code*.

[44] The employers argue that the union should not be permitted to use section 35 of the *Code* to expand its existing bargaining unit and should be required to organize the employees at Cantrail it seeks to represent (citing *Air Canada et al.* (1989), 79 di 98; 7 CLRBR (2d) 252; and 90 CLLC 16,008 (CLRB no. 771)). The employers also point out that PCL has owned Cantrail since 2005, and the union delayed some five years before bringing this application. They suggest that this lack of due diligence should militate against the granting of the union's application.

[45] The employers submit that the sale of business provisions of the *Code* are not applicable in the present case, as there is no evidence that there has been any sale of business from PCL to Cantrail within the meaning of the *Code*. In particular, they assert that there is no evidence that any employees, goodwill or equipment were transferred from PCL to Cantrail as a consequence of PCL's decision to cease offering extra-provincial charter service.

2–Board File No. 28548-C

[46] While admitting that anti-union animus is not a required element in order to find that there has been a contravention of section 94(1) of the *Code*, the employers submit that the Board must conduct an objective analysis of the effect of the employers' actions on the legitimate rights of the employees and their bargaining agent. The employers submit that they are entitled to rebut the union's allegations of unlawful interference by demonstrating that their actions were taken for *bona fide* business reasons. The employers also admit that they have the burden of proof with respect to the union's allegations under section 94(3) of the *Code*, but argue that this burden can be met by demonstrating a *bona fide* business reason for the impugned decision.

[47] PCL submits that its decision to cease providing extra-provincial charters was taken entirely to reduce costs. It explains that extra-provincial charters were only a small part of PCL's business, representing less than 3% of all of its charter work. Expenses related to serving this market included vehicle insurance and licensing costs, drug testing of employees, and compliance with regulatory requirements in the other jurisdictions. After conducting a cost/benefit analysis, PCL concluded that it was uneconomic for it to continue providing extra-provincial services. While it is equally as expensive for Cantrail to operate extra-provincially, the employers submit that, because Cantrail is

required to operate out-of-province as a result of its Amtrak contract, Cantrail already incurs these costs. Since the fixed costs of licenses, insurance, testing etc. are incurred to provide the Vancouver-Seattle scheduled service, the additional or incremental costs to Cantrail for operating extra-provincial charters are minimal.

[48] PCL states that it informed the union on a number of occasions of its concerns regarding the profitability of the charter operations. It points out that one of the union's witnesses confirmed that, during the bargaining for the current collective agreement which took place in 2009, PCL was primarily concerned with cutting costs and increasing operational flexibility. PCL made it clear that the company's priority was its scheduled service, not its charter operations.

[49] PCL admits that it did not raise the issue of ceasing extra-provincial charter operations during bargaining, explaining it had not considered that possibility at the time. It was only later, after the terms of the collective agreement had been signed and ratified, that the management group at PCL began to look at the steps they could take to cut costs in order to prevent further losses. However, PCL's focus was still on its cross-water scheduled service and it was not until mid-2010 that its attention turned to the costs and revenues related to its extra-provincial charter operations.

[50] PCL submits that it had a *bona fide* business reason for the decision to cease its extra-provincial charter operations, and that this provides a complete answer to the union's unfair labour practice complaint. It provided the Board with a spreadsheet it had prepared in support of its conclusion that the extra-provincial work was not profitable, and points out that the union has not challenged the accuracy or veracity of the company's financial statements. PCL submits that its decision to cut extra-provincial charter services was a legitimate business decision that was made as part of an overall cost-cutting exercise necessitated by its financial difficulties, and was not a calculated measure intended to undermine the bargaining unit.

[51] PCL asserts that it was not required by law to discuss this matter with the union prior to making its business decisions, and that, in any event, the union was aware of the employer's concerns regarding the profitability of the company in light of the losses it had sustained in 2009 and 2010, due to the decline in passenger volumes on the cross-water scheduled service, the unsuccessful effort

to operate a scheduled service on the BC Ferry between Tsawwassen and Nanaimo, the increased competition and corresponding decline in charter work, and the delay in obtaining a monopoly on the YVR-Whistler route. In light of these financial difficulties, the principals of PCL did not consider the decision to discontinue extra-provincial charter work as a significant one, given that, at the same time, they were decreasing the scheduled service on the YVR-Whistler route and seeking amendments to PCL's license to permit it to decrease the minimum required services between Vancouver and Victoria.

[52] PCL submits that it was permitted to close a small, insignificant part of its business and carry on its business as it sees fit, and that its actions did not violate the *Code*. It asks that the complaint be dismissed.

IV–Analysis and Decision

[53] At the commencement of the hearing, the Board issued an order for the exclusion of witnesses. A procedural issue arose at the opening of the respondent's case, when the employer advised the Board that it had two instructing clients and that both would be witnesses in the proceeding. The union objected to permitting either of these individuals to be present during the testimony of the witness who would testify first. Employer counsel indicated he would be at a fundamental disadvantage if no instructing client was available to him during cross-examination and thus that both instructing clients should be exempt from the exclusion order. The Board's research was unable to identify any previous cases in which this issue had arisen, and the parties were asked to make submissions on the point.

[54] The union submitted that if an advisor is to be called as a witness, it was within its rights to insist that this advisor testify first. However, the union insisted that if both advisors were scheduled to testify, then one had to be excluded during the testimony of the advisor who was the first to testify.

[55] The employer argued that, while the Board can determine its own procedure and has the discretion to exclude witnesses, it must observe natural justice and administrative fairness. In this case, the employer argued, the principle of *audi alteram partem* would be breached if its right to

present its case as it saw fit were to be fettered by a procedural ruling excluding one of its instructing advisors. The employers' counsel was of the view that, regardless of which of his two instructing advisors the employer called as the first witness, he needed the other witness to be present to advise him.

[56] In Bryant et al., *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed. (Toronto: LexisNexis Canada, 2009), the authors suggest that the rationale for the exclusion of witnesses is to preserve a witness' testimony in its original state:

> ... A witness listening to the evidence given by another may be influenced by the latter's testimony and accordingly change his or her evidence to conform with it. Also, by being present in the courtroom and listening to testimony prior to giving evidence, he or she may be able to anticipate, and thereby reduce the effectiveness of, the cross-examination that will ultimately be faced. It may also facilitate collusion by allowing a witness to tailor the evidence to fit that of another. An order excluding witnesses seeks to eliminate this potential unfairness.
>
> (page 1099)

[57] It is generally accepted that a corporate party may designate whomever it wishes as its advisor, even potential witnesses (see *Canadian Radio-Television and Telecommunications Commission* v. *Canada (Human Rights Tribunal)*, [1991] 1 F.C. 141). As well, at a tribunal's discretion, a party who is a witness can be exempted from an exclusion order if his/her presence is necessary to instruct counsel (see *Homelite* v. *Canada (Canadian Import Tribunal)*, (1987) 15 F.T.R. 10). The issue in this case was whether the employers, as corporate parties, were entitled to have two instructing advisors, both of whom were to be witnesses, present in the room when the evidence of the first advisor was being given.

[58] In Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, loose-leaf edition (Scarborough: Carswell, 1995) at pages 12-116 to12-117), the authors suggest that, in situations where the potential for tailoring of evidence by a witness is of concern, the matter must be determined on a case-by-case basis, taking into account factors such as the importance of the interests to be protected on both sides; the threat to those interests by the party's attendance or exclusion; and the adequacy of alternative means of participation. In practical terms, the tribunal must identify and balance the competing interests at stake.

[59] In the Board's view, the evidence to be given by the employers' witnesses would be critical to a number of the issues in dispute between the parties in this proceeding, and that credibility would therefore be an important factor in the Board's analysis of that evidence. Accordingly, the Board determined that it was not appropriate for the second witness, despite being an instructing advisor of the responding party, to be present in the hearing room during the testimony of the first advisor/witness. However, to mitigate any prejudice to the employer, the Board offered the employer an alternative: either a different individual from PCL, who would not be called as a witness, could be present to act as counsel's advisor during the testimony of the first advisor/witness or, in the alternative, the second advisor/witness could wait outside the hearing room during the testimony of the first advisor/witness and counsel would be provided with any adjournments necessary to allow him to consult with the second advisor/witness. The employer agreed to proceed with a different instructing advisor during the testimony of the first advisor/witness.

A–Board File No. 27984-C

1–The Jurisdictional Issue

[60] In *PCL 2427*, the Board determined that both PCL and Cantrail were subject to federal jurisdiction, and that it had the necessary authority to consider the CAW's application. At that time, the Board found that PCL held licenses permitting it to operate outside of the province and regularly used those licenses to make extra-provincial trips. PCL had held itself out to the public as being ready, willing and able to make extra-provincial trips, and consistently made such trips when requested to do so by a client. In the Board's view, it did so with sufficient frequency that its extra-provincial activities could be considered regular and continuous, even though the volume of such traffic was small in relation to the company's scheduled operations.

[61] However, the facts on which the Board found that PCL was within federal jurisdiction, and therefore subject to the *Canada Labour Code*, changed significantly following the release of *PCL 2427*. PCL reviewed and revised its operations and no longer holds licenses permitting its vehicles to operate outside of the province. Consequently, it no longer offers extra-provincial trips

to its clients. The last out-of-province trip took place on January 12, 2011. The uncontested evidence before the Board was that, since that date, PCL has not offered or operated any extra-provincial services.

[62] Because PCL no longer has any extra-provincial operations, the basis on which the Board originally found it had jurisdiction over that company no longer exists. As jurisdiction is a threshold issue, the Board must first determine whether it still has any jurisdiction to hear and decide the union's application and complaint naming PCL as a party.

[63] It is not disputed that Cantrail, a wholly owned subsidiary of PCL, continues to operate as a full service motor coach operator providing charter and daily scheduled service outside of British Columbia. None of the parties have disputed that Cantrail remains subject to federal jurisdiction for labour relations purposes. However, the union argues that the Board should find that PCL is integral to the operation of Cantrail, and therefore that PCL remains subject to federal jurisdiction on that basis. In the alternative, the union argues that PCL remains in federal jurisdiction because the two companies are managed as a single enterprise and therefore are a single, indivisible, functionally integrated federal undertaking. The union relies on the Supreme Court of Canada's decision in *Westcoast Energy Inc.* v. *Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (*Westcoast Energy*), in which the Court indicated that related undertakings may come within federal jurisdiction in one of two ways: (1) if they constitute a single federal work or undertaking, or (2) if they are integral to a core federal transportation facility.

(a) Are PCL and Cantrail a single enterprise?

[64] If PCL and Cantrail are a single, indivisible enterprise, as the union submits, then by virtue of Cantrail's interprovincial operations, the entire enterprise would be subject to federal jurisdiction under the legal doctrine of undivided jurisdiction: i.e., that a transportation or communication undertaking can be subject to only one level of government regulation (see *Toronto (City)* v. *Bell Telephone Co. of Canada*, [1905] A.C. 52; and *Ontario (Attorney General)* v. *Winner (c.o.b. Mackenzie Coach Lines)*, [1954] A.C. 541).

[65] In the case cited by the union, *Westcoast Energy*, the company's gathering pipelines, processing plants and mainline transmission pipeline were held to constitute a single federal transportation undertaking within the exclusive jurisdiction of Parliament by virtue of section 92(10)(*a*) of *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3. In making this ruling, the Court determined that several operations carrying on different activities may be considered a single federal undertaking for the purpose of section 92(10)(*a*) if they are functionally integrated and subject to common management, control and direction. In the Court's view, close commercial relationships, common ownership and/or common management are not sufficient in and of themselves, there must be evidence of functional integration–both a physical and an operational connection. The inquiry into whether various operations are functionally integrated and managed in common requires an examination of the factual circumstances of any given case. The manner in which the undertaking might have been structured or the manner in which other similar undertakings are carried on are not relevant. The fact that one aspect of a business is dedicated exclusively or even primarily to the operation of the core interprovincial undertaking is an indication of the type of functional integration that is necessary for a single undertaking to exist. However, it remains only one factor to consider and may not be sufficient by itself. It is the overall degree of functional integration and common management which must be assessed.

[66] In *Westcoast Energy*, the Court identified certain indicia to assist in the section 92(10)(*a*) analysis. The primary factor to consider is whether the various operations are functionally integrated and subject to common management, control and direction. The absence of these characteristics will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking, although the converse will not necessarily be true. Other relevant considerations, although not determinative, include whether the operations are under common ownership and whether the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers, or whether they are generally available to clients.

[67] The manner in which the various Westcoast Energy businesses and facilities were operated demonstrated to the Court that the company managed them in common, as a single enterprise that was functionally integrated. The Court found that the various enterprises shared a common primary

purpose and that Westcoast Energy's various facilities and personnel were subject to common control, direction and management, and were operated in a coordinated manner.

[68] In the instant case, PCL and Cantrail have admitted that they are subject to common control and direction. The evidence indicates that, at the most senior levels, they share a common management that makes decisions affecting both companies. However, the evidence before the Board was that these decisions are made based on management's view of the strengths and expertise of each company; for example, Cantrail bid on the West Coast Express work while PCL did not because of the owners' view that this work was complementary to Cantrail's Amtrack service. Conversely, PCL bid on the YVR-Whistler work while Cantrail did not, because of the owners' view that this winter work fit well with PCL's summer cross-water service; the work required similar support services and allowed PCL to make better use of its assets. PCL sees itself as primarily a scheduled service provider with a higher end product, for which there are few competitors. Because it is a higher cost operation, PCL is less competitive with respect to charter work, where there are a number of companies in the market. Cantrail, on the other hand, has a lower cost structure and competitive pricing and has been very successful in the charter market.

[69] There was little or no evidence that the companies are functionally integrated: each company has its own drivers and dispatchers, with different terms and conditions of employment. PCL drivers wear uniforms, while Cantrail drivers wear a company shirt but provide their own trousers. The two companies do not coordinate their service schedules. The companies have separate branding and PCL endeavours to market itself as a more sophisticated carrier. While Cantrail purchases bus cleaning, maintenance, repair and yarding services from PCL, so do a number of other unrelated bus lines.

[70] PCL has operated as a bus line for a number of years. Cantrail existed as a separate entity before it was purchased by PCL. Although, as a result of this purchase, Cantrail now purchases various maintenance services and leases space from PCL, this is not sufficient to conclude that the two companies are indivisible. As a result, the Board concludes that there is not a sufficient degree of functional integration between PCL and Cantrail to permit a finding that they are a single, indivisible enterprise.

(b) Is PCL integral to Cantrail?

[71] The fact that PCL is not itself a federal work or undertaking does not necessarily prevent a finding that the company falls within federal jurisdiction for labour relations purposes. If PCL is found to be an integral part of a federal work or undertaking, namely Cantrail, it will also be subject to the provisions of the *Code* (see *Reference re: Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529 (the *Stevedores' Reference*); *Northern Telecom Canada Limited et al.* v. *Communication Workers of Canada et al.*, [1983] 1 S.C.R. 733; and *Bernshine Mobile Maintenance Ltd.* v. *Canada Labour Relations Board*, [1986] 1 F.C. 422 (F.C.A.)).

[72] The inquiry is one of fact: is the nature of the work performed by PCL for Cantrail essential, vital or integral to Cantrail's operations? The appropriate test for determining whether a local enterprise is essential to the operation of an inter-provincial enterprise was described by the Supreme Court of Canada in *United Transportation Union* v. *Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, as follows:

> The issue of whether the federal government has jurisdiction over the labour relations of a work or undertaking not in itself federal has been before this Court on a number of occasions. The basic criteria for deciding this issue were addressed in *Reference re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (the *Stevedores' Reference*), a case which concerned the constitutional validity of Parliament's attempt to regulate the labour relations of stevedores by means of a predecessor to s. 4 of the *Canada Labour Code*. In the *Stevedores' Reference*, the undisputed federal undertaking was the international and interprovincial flow of cargo carried by ships into and out of the port of Toronto. The loading and unloading services were supplied to the shipowner and the cargo shippers by a stevedoring company, which was in no way connected, through corporate ownership, to the shipping concerns. The goods were unloaded by the stevedores and then were placed upon domestic land-operating transport facilities for onward transportation to the consignee.
>
> This Court found the legislation in question to be *intra vires* the federal government. In an eight to one decision, the stevedoring operations were found to be an integral or essential part of the interprovincial or international transportation of goods by ship. The operational connection and integration between the federal undertaking and the stevedores was complete - the stevedores were an essential "link in the chain" of the federal operation. Effective performance of the federal undertaking would not be possible without the services of the stevedores. Federal jurisdiction there seems to have been based on a finding that the core federal undertaking was dependent to a significant degree on the workers in question.
>
> The above reading of the *Stevedores' Reference* was verified in *Letter Carriers' Union of Canada* v. *Canadian Union of Postal Workers*, [1975] 1 S.C.R. 178 (*Letter Carriers'*), where the same issue was considered. In *Letter Carriers'*, the Canadian Union of Postal Workers challenged the jurisdiction of the Saskatchewan Labour Relations Board to certify a union for the respondent company. The respondent company had a number of contracts with Canada Post for the delivery and collection of mail, these contracts comprising 90 per cent of the respondent company's business. In finding that the

employees of the respondent company fell under federal jurisdiction, the court seems to have been much influenced by the dependence of the post office upon its subcontractors for mail delivery. Ritchie J., speaking for the Court, held, at p. 183:

> In my opinion the work so described which is performed by these employees is *essential to the function of the postal service and is carried out under the supervision and control of the Post Office authorities....*
>
> [Emphasis added.]

He later commented, at p. 186, that the work of the respondent company's drivers "was an integral part of the effective operation of the Post Office".

Both the *Stevedores' Reference* and *Letter Carriers'* cases indicate that dependence of a core federal work or undertaking upon a group of workers tends to support federal jurisdiction over those workers. In subsequent judgments of this Court, this jurisdictional test has been elaborated upon. Prime among these more recent decisions is *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115 (*Northern Telecom No. 1*), where this Court considered the proper interpretation and application of ss. 2 and 4 of the *Canada Labour Code*. Specifically, the issue in *Northern Telecom No. 1* was whether the employees of Northern Telecom were employed upon or in connection with the operation of any federal work or undertaking, so as to bring them within the jurisdiction of the Canada Labour Relations Board. The core federal work in question was the telephone and telecommunications system operated by Bell Canada.

This Court reviewed the relevant case law and devised a test for the determination of whether a group of employees falls within federal or provincial jurisdiction. This test involves looking for a practical or functional integration between the core federal work or undertaking and the employees in question. In *Northern Telecom No. 1*, the guiding principles were summarized from the decision of Beetz J. in *Construction Montcalm Inc.* v. *Minimum Wage Commission*, [1979] 1 S.C.R. 754, and set out as follows at pp. 132-33:

> (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
>
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
>
> (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.
>
> (5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

> (6) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of a "going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

A recent decision of the British Columbia Labour Relations Board, *Arrow Transfer Co. Ltd.*, provides a useful statement of the method adopted by the courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the courts look at the particular subsidiary operation engaged in by the employees in question. The court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the Chairman of the Board phrased it, at pp. 34-5:

> In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship.

In *Northern Telecom Canada Ltd.* v. *Communication Workers of Canada*, [1983] 1 S.C.R. 733 (*Northern Telecom No. 2*), the same issues were before the Court, though with respect to a different set of workers. It was again emphasized that the jurisdictional question depends mainly upon the nature of the relationship between the core federal work or undertaking and the enterprise in question.

The principles enunciated in *Northern Telecom No. 1* are not intended to be applied in a strict or rigid manner; instead, the test should be flexible and attentive to the facts of each particular case. As was stated in *A.G.T.* v. *C.R.T.C.*, at p. 258:

> It is impossible, in my view, to formulate in the abstract a single comprehensive test which will be useful in all of the cases involving s. 92(10)(a). The common theme in the cases is simply that the court must be guided by the particular facts in each situation, an approach mandated by this Court's decision in *Northern Telecom*, 1980, *supra*. Useful analogies may be found in the decided cases, but in each case the determination of this constitutional issue will depend on the facts which must be carefully reviewed as was done by the trial judge in the present appeal.

The issue in *A.G.T.* v. *C.R.T.C.* differed somewhat from that arising in *Northern Telecom No. 1* and *Northern Telecom No. 2* as the jurisdictional question related to the Canadian Radio-television and Telecommunications Commission rather than the Canada Labour Relations Board. Nevertheless, the flexible approach advocated in *A.G.T.* v. *C.R.T.C.* is equally applicable in the context of labour relations.

(pages 1136–1140)

[73] Applying this test to the facts of this case requires the Board to first look at the operation which is at the core of the federal undertaking (Cantrail), and then at the particular subsidiary operations engaged in by the employees in question (PCL). It must then arrive at a judgment as to whether the relationship of PCL to Cantrail is one that is essential or integral.

[74] Although the ultimate determination does not turn on the nature of the corporate structure, it is worth noting once again that common control and direction of PCL and Cantrail has been admitted by the employers. The corporate officers of both companies include Frank Chen, Dennis Shikaze and Martin Yeh. The Vice-President, Operations and Planning at PCL, Thomas Choe, works for both PCL and Cantrail. According to his estimate, he spends approximately 20% of his time on Cantrail work and the remainder for PCL. However, the companies maintain separate workplaces and separate work forces. There is no intermingling of employees at the operational level.

[75] The normal or habitual operation of Cantrail is the provision of scheduled and charter bus services within and beyond the borders of British Columbia. Cantrail employs its own workforce, which includes a Charter Manager, dispatchers and drivers. However, it purchases various services from PCL, including fuel and the cleaning, maintenance and repair of its buses. Cantrail also rents office space and leases tires from PCL.

[76] The normal or habitual operation of PCL is the provision of scheduled and charter bus services within the province of British Columbia. In addition to its intra-provincial transportation activities, PCL operates an in-house cleaning, maintenance and repair division to service its own buses. PCL offers these services to other bus companies, including Cantrail, for a fee. However, on the facts before the Board, it cannot be said that this aspect of PCL's business, although important to Cantrail, is dedicated exclusively or even primarily to Cantrail's operations.

[77] It is not unusual for a transportation company to operate its own in-house maintenance and repair shop. The predecessor to this Board, the Canada Labour Relations Board (CLRB), dealt with a similar situation in *Bernshine Mobile Maintenance Ltd. (CLRB 465)*, *supra*. In that case, a federally regulated trucking company, Reimer Express Lines Ltd. (Reimer), originally performed its own tire maintenance and vehicle washing, but decided to contract out this work to a former employee, Mr. Bernshine. Bernshine incorporated a company and entered into a contract with Reimer. On application by the union for a declaration of sale of business and successor rights, one issue for the CLRB was whether Bernshine's operations were in federal jurisdiction. The evidence before the CLRB was that all of Bernshine's work was done in Reimer's fully equipped wash bay and trailer shop bay, which Reimer leased to Bernshine. Bernshine used Reimer's equipment and supplies

including soap, tires and tire patches. Bernshine's only input was labour; his employees performed the same tasks that Reimer's unionized employees had performed previously. At the time of the Board's proceedings, Reimer was Bernshine's only customer. The CLRB concluded:

> In the present case, as long as the work was being done "in house" by Reimer, the parties had assumed the truck wash and tire repair operations fell within federal jurisdiction as do the rest of Reimer's operations. Does anything change because of the fact that the services are now performed by Bernshine, a separate company with no corporate connection with Reimer? We think not.
>
> ...
>
> In a labour relations sense Bernshine is a separate company and a separate employer compared to Reimer, but in a constitutional sense Bernshine's business is an integral part of Reimer's federal undertaking. We therefore conclude that this Board has constitutional jurisdiction over Bernshine.
>
> (pages 105 and 106)

[78] The CLRB's decision was upheld by the Federal Court of Appeal in *Bernshine Mobile Maintenance Ltd.* v. *Canada (Labour Relations Board)*, *supra*. Among other things, the Court found that it was clear from the evidence before the CLRB that the maintenance of tires was very important to Reimer and for competitive as well as hygienic reasons, clean trucks and clean trailers, were also important to Reimer. The Court noted that the performance agreement between Bernshine and Reimer expressly recognized the importance of tire maintenance to Reimer's operations and included a requirement that Bernshine provide repairs and maintenance on a daily, continual 24 hour basis, including Sundays and holidays.

[79] In agreeing that Bernshine was integral to Reimer's operations, the Court also found that there were virtually no Bernshine operations other than those performed for Reimer, as Reimer was Bernshine's only customer. In this regard, the Court said:

> 27. In this case, since, at the time of the hearing, Reimer was Bernshine's only customer, the importance of the Reimer work to it is obvious. It certainly cannot be said that it was exceptional or casual. In that sense, its situation differs markedly from that of suppliers of gas and oil at the various roadside service stations upon which the highway transport drivers must from time to time rely when shortages of fuel occur. Counsel for the appellant attempted to equate Bernshine's operations to those of such suppliers. **This is not to say, of course, that every company which provides tire**

> **maintenance and truck wash services to a federal transport business falls under federal jurisdiction. Whether they do or not must, in part, depend on determining whether or not the services they provide are casual or exceptional. On the peculiar facts of this case they were certainly not.**
>
> (pages 433–434; emphasis added)

[80] In the instant case, the provision of bus cleaning, maintenance and repair services is not the primary business of PCL, it performs these services on its own account and makes them available to various other customers. Prior to its purchase by PCL, Cantrail had other arrangements for cleaning, maintenance and repair. In conducting his analysis of Cantrail's operations prior to making the offer to purchase, maintenance was one item that Mr. Shikaze identified as an area where cost reductions were possible. However, although both companies benefit from economies of scale from the arrangement, Cantrail is not obliged to purchase its bus cleaning, maintenance and repair services from PCL. There was some evidence that, on occasion, Cantrail does use other garages for maintenance work.

[81] In the Board's view, the circumstances in which PCL provides cleaning, maintenance and repair services to Cantrail is clearly distinguishable from those that were in place between Bernshine and Reimer. Unlike Bernshine, who had no clients other than Reimer, PCL provides these services for itself and other companies. Its work in this regard is not dedicated exclusively or even primarily to Cantrail's operations. While it may be more economically advantageous for Cantrail to obtain these services from PCL, in and of itself, this is not sufficient reason to justify a finding that PCL is essential to Cantrail with respect to the maintenance, repair and cleaning of its buses.

[82] PCL's offices are at 1150 Station Street (Pacific Central Station). Cantrail's office is on Vernon Drive, in space over PCL's maintenance facility that it rents from PCL. The evidence indicates that PCL has rented space at the Vernon Drive facility to other, unrelated bus companies in the past. Cantrail leases parking spaces at 900 Evans Avenue from PCL that it uses to park its buses. PCL provides yarding services at this location to other bus companies as well as Cantrail. As in the case of the maintenance services, the rental of office and yarding space to Cantrail by PCL is

not a core part of PCL's business. On the basis of the evidence provided, the Board cannot find that Cantrail is dependent upon PCL for its office space or bus yarding in a manner that would make PCL integral to Cantrail.

[83] PCL sells fuel to Cantrail, but imposes a 15–18.5% mark up. It also leases tires to Cantrail and applies the same markup as it applies to all of its customers. While these services are clearly of value to Cantrail, it is not required to purchase its fuel or lease its tires solely from PCL. Therefore, it cannot be said that PCL's services in this regard are integral to Cantrail.

[84] The evidence reveals that there is no daily or simultaneous connection between the operations of Cantrail and PCL. Each operates independently and serves its own clients, with no requirement for either to co-ordinate its schedules with those of the other company. This is unlike the situation in *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115 (*Northern Telecom No. 1*), where the Supreme Court of Canada noted that employees of Northern Telecom Ltd. (Northern Telecom) had daily contact and had to closely co-ordinate their work with that of the Bell Canada employees. In that case, Bell Canada and Northern Telecom worked together in order to provide a single service and it was necessary for Northern Telecom workers to be on Bell premises on a daily basis. Such is not the case here, as Cantrail and PCL operate independently, each within its own sphere.

[85] The evidence indicated that Cantrail and PCL each farm out to, and perform overloads for, the other but each also uses other companies for these overloads. There is no exclusivity of contract between PCL and Cantrail for such work. Furthermore, when one company is performing an overload for the other, it treats the work as a charter and charges the appropriate fee. The Board is unable to find any physical or operational connection between the two companies that would suggest that Cantrail is dependent on PCL for its work.

[86] Considering all of these factors, the Board is unable to find that the effective performance of Cantrail's operations is dependent upon the services of PCL. Accordingly, it is unable to conclude that PCL is integral to Cantrail's operations and thus within federal jurisdiction. As a result, the Board has determined that it does not have jurisdiction over PCL.

2–Application for a Declaration of Single Employer (Section 35 of the Code)

[87] As the Board has determined that it does not have jurisdiction over PCL, it is unable to proceed with the union's application for a declaration of single employer pursuant to section 35 of the *Code*. However, even if the Board had found that PCL remained in federal jurisdiction for labour relations purposes, it would not have issued a declaration of single employer, as it is not satisfied that there is a sufficient labour relations purpose for doing so at this time.

[88] The primary purpose of section 35 of the *Code* is to prevent an employer from using its corporate structure to avoid its collective bargaining responsibilities by, for example, shifting work from one employing entity which is unionized to another alternative employing entity which is not. Essentially, this provision of the *Code* allows the Board to lift the corporate veil in order to determine whether rights granted under the *Code* are being defeated as a result of improper employer activities. However, on the basis of the evidence before it in this case, the Board is unable to conclude that Cantrail has been used by PCL to undermine the bargaining unit or the union's bargaining rights at PCL.

[89] There is no evidence of a transfer of buses or work from PCL to Cantrail. When PCL has overload work, it farms that work out to various companies, not just to Cantrail. Although the union alleges that there is labour relations harm when Cantrail buses are used to do PCL's YVR-Whistler work, the evidence demonstrated that Cantrail only does this work when PCL has an insufficient number of drivers or buses and is obliged to farm out the work. The union's suggestion that PCL should purchase more buses in order to avoid farm out situations does not make economic sense, given the expense associated with such assets. With respect to the union's allegation that PCL is diverting new business to Cantrail, the Board also accepts the employers' explanation as to why it decided Cantrail would bid on the West Coast Express work, rather than PCL.

[90] Accordingly, if the Board had jurisdiction over PCL, it would still have exercised its discretion to dismiss the union's application for a declaration of single employer under section 35 of the *Code*.

3–Sale of Business–Successor Rights

[91] The union submits that there has been a sale of business from PCL to Cantrail within the meaning of section 44 of the *Code*, and that its rights as the bargaining agent should therefore follow the work to Cantrail. It suggests that PCL's decision to discontinue its extra-provincial operations allows Cantrail to take on that business. The union alleges that the elements of the sale include continuity of the work (extra-provincial charters), transfer of assets, management and know-how, employees, financial and administrative support, maintenance support, goodwill and expertise.

[92] The union alleges that Cantrail is carrying on an inter-provincial business that involves common or similar customers and clients, in the same or similar markets and geographic areas, as PCL did; that both companies remain subject to common control and direction; and that PCL has transferred an employee, Yvonne Windsor, to Cantrail as its Charter Manager. It points out that PCL has assisted Cantrail financially by refinancing loans, infusing cash and settling debts; has transferred assets such as the right to sublease property, maintenance services, parking facilities and office space. It also alleges that there has been a transfer of good will, know-how and expertise through the replacement of Cantrail ownership and management with PCL ownership and management to carry on the business.

[93] In order to find that a sale of business has occurred, the Board generally looks for evidence that an identifiable part of a business has been transferred from one employer to another. In cases that do not involve a sale of shares, the Board will look at evidence such as the transfer of equipment, the physical location of the work, employees, expertise, goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts and/or inventory and whether there is a hiatus in production or service or a non-competition agreement (see, for example, *Parrish & Heimbecker, Limited*, 2004 CIRB 264). None of those elements are present here. There has been no evidence presented that there was any transfer of equipment, employees, expertise, goodwill, customer lists, accounts receivable or contracts from PCL to Cantrail at the time PCL discontinued its extra-provincial operations.

[94] Many of the transactions that the union relies on (for example, financial support and the replacement of Cantrail ownership and management with PCL ownership and management) are evidence of the original sale in which PCL acquired Cantrail. PCL has not denied that there was a sale of business in 2005 when it acquired Cantrail. However, at the time that PCL decided to discontinue its extra-provincial charter work, there is no evidence that it transferred that work or any of the assets used to perform that work from PCL to Cantrail. Cantrail continued to do what it had always done: provide scheduled and charter bus service within and outside of British Columbia. On the facts of this case, the Board is unable to find that PCL's decision to discontinue its inter-provincial charter work, which thereby created increased opportunities for Cantrail (and other competitors) to bid for this work, constitutes a sale of the inter-provincial portion of PCL's business to Cantrail.

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[95] The union submits that PCL shut down its extra-provincial charter operations in order to prevent the Board from exercising its jurisdiction, that this decision thwarted the union's efforts to obtain representation rights for the Cantrail employees, and that the decision was motivated by anti-union animus. The union argues that, at the time that the decision was made, PCL was still within federal jurisdiction, and the Board therefore has jurisdiction to find that PCL's decision violated the *Code*. Furthermore, the union argues that the employer had a duty to consult with the union over the decision to discontinue its inter-provincial work, which the union characterizes as significant organizational change.

[96] Whether or not the Board had jurisdiction over PCL in the period leading up to the January 2011 decision to discontinue inter-provincial charter operations, the Board no longer has any such jurisdiction, and in particular no jurisdiction to issue any remedy against PCL. As a result, the Board has determined that the union's unfair labour practice complaint is moot and declines to rule on it.

V–Conclusion

[97] As the Board noted in *PCL 2427*, in order to find federal jurisdiction, the facts must establish that the employer makes extra-provincial trips on a regular and continuous basis (*Pioneer Truck Lines Ltd.*, 1999 CIRB 31; *Autocar Royal (9011-4216 Quebec Inc.)*, 1999 CIRB 42; and *Acadian Lines Limited* (1994), 96 di 41 (CLRB no. 1094)). In view of the changes that PCL has implemented, the Board is compelled to find that it has lost jurisdiction over PCL and that the company has reverted to provincial jurisdiction for labour relations purposes.

[98] The application for a declaration of single employer and the unfair labour practice complaint are therefore dismissed for lack of jurisdiction.

[99] The certification order issued to the union by the Board on October 21, 2010 (9954-U) is no longer of any force or effect. Nevertheless, the union's bargaining rights with respect to PCL employees continue to exist as a result of the pre-existing certification orders issued by the British Columbia Labour Relations Board (BCLRB).

[100] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

André Lecavalier
Member

Norman Rivard
Member